No. 91-569

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the grant of criminal jurisdiction set forth in the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (commonly known as Public Law 280), permits a State to enforce its civil laws prohibiting speeding and other motor vehicle infractions against Indians on an Indian reservation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

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This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. In 1953, in response to the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement," *Bryan* v. *Itasca County*, 426 U.S. 373, 379 (1976), Congress passed the Act of Aug. 15, 1953, ch. 505 (Pub. L. No. 83-280), 67 Stat. 588, commonly known as Public Law 280. The first five sections of Public Law 280 automatically ceded criminal and civil jurisdiction over matters involving Indians in Indian country (with exceptions for certain specified reserva-

tions) to five named States, which did not include Washington. 67 Stat. 588-590. In particular, Section 2 ceded jurisdiction over criminal matters,[1] and Section 4 ceded jurisdiction over civil matters.[2] 67 Stat. 588-589. Sections 6 and 7 granted all other States the option of assuming similar jurisdiction. 67 Stat. 590; see generally *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471-474 (1979).

2. Washington first acted to acquire jurisdiction under Public Law 280 in 1957, when it enacted a statute providing for the general assumption of criminal and civil jurisdiction over Indian country, upon the request of any tribe. Ch. 240, 1957 Wash. Laws 941-942. In 1963, Washington revised that statute in two respects: first, to provide for assumption of jurisdiction without tribal consent, and second, to limit the jurisdiction over Indians on tribal or allotted lands to eight specified subjects, including "[o]peration of motor vehicles upon the public streets, alleys, roads and highways." Ch. 36, § 1, 1963 Wash. Laws 347 (codified at Wash. Rev. Code Ann. § 37.12.010 (1991).[3]

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[1] For discussion of the limits on the jurisdiction granted by Section 2, see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207-212 (1987) (holding that a California gambling statute that provided for criminal penalties did not fall within the grant of criminal jurisdiction set forth in Section 2).

[2] For discussion of the limits on the jurisdiction granted by Section 4, see *Bryan* v. *Itasca County*, 426 U.S. 373, 381-393 (1976) (holding that the jurisdictional grant in Section 4 did not include the power to impose taxes).

[3] This Court upheld the validity of Washington's 1963 assumption of jurisdiction against various challenges in *Wash-*

3. In 1979, Washington's legislature decriminalized much of its motor vehicle code, "to promote the public safety and welfare on public highways and to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions." Ch. 136, § 1, 1979 Wash. Laws 1418 (1st Ex. Sess.), codified at Wash. Rev. Code Ann. § 46.63.010 (1991). Section 46.63.020 provides that, except for various specifically listed offenses (such as reckless driving or driving while intoxicated), no failure to comply with any provision of the State's motor vehicle code shall "be classified as a criminal offense," but instead shall be "designated as a traffic infraction." Title 46 does not provide for imprisonment for traffic infractions, and the maximum penalty generally is a monetary assessment of $250. § 46.63.110(1). If a

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ington v. *Confederated Bands & Tribes of The Yakima Indian Nation*, 439 U.S. at 476-499.

Section 5 of the 1963 Act also provided that, upon request of the tribe, the State would assume not only the limited mandatory jurisdiction described in Section 37.12.010, but full jurisdiction throughout Indian country. 1963 Wash. Laws 348-349, codified at Wash. Rev. Code Ann. § 37.12.021 (1991). Respondent Confederated Tribes of the Colville Reservation made an election under Section 37.12.021, effective January 29, 1965. See *Tonasket* v. *State*, 525 P.2d 744, 746 n.2 (Wash. 1974) (en banc). Subsequently, Section 403(a) of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 79, 25 U.S.C. 1323(a), authorized the United States to accept certain retrocessions of jurisdiction previously assumed under Public Law 280. Washington thereafter enacted a procedure to permit retrocession of all jurisdiction other than the mandatory jurisdiction described in Section 37.12.010. See Wash. Rev. Code Ann. §§ 37.12.100-37.12.140 (1991). Pursuant to that procedure, Washington has retroceded to the United States all jurisdiction over the Reservation of the respondent Tribes other than the mandatory jurisdiction described in Section 37.12.010. See 52 Fed. Reg. 8372 (1987); Pet. App. B7.

person challenges a citation for a traffic infraction, state law does not entitle him to a jury trial, § 46.63.090(1), and the burden of proof on the State is only "to establish the commission of the infraction by a preponderance of the evidence," § 46.63.090(3).

4. On May 21, 1988, respondent Fry, a member of respondent Confederated Tribes of the Colville Reservation,[4] was stopped by a Washington State Patrol officer while driving his motor vehicle on a public road within the Tribes' Reservation. He was cited by the officer for violation of the speed restrictions set forth in Wash. Rev. Code Ann. § 46.61.400 (1991). Because this violation is not listed in Section 46.63.020, the officer issued Fry a civil complaint alleging that he had committed a traffic infraction. See Pet. App. A3, B1-B2.

5. Fry and the Tribes then commenced this action in the United States District Court for the Eastern District of Washington, contending that Public Law 280 does not authorize petitioners' attempt to enforce the State's civil traffic laws against Indians on the Reservation. The district court rejected respondents' contention and granted summary judgment for petitioners. Pet. App. B1-B20. Relying on this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the court concluded that petitioners' assertion of jurisdiction under

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[4] Respondent is a federally recognized Indian Tribe, which was formed from eleven historical Tribes placed upon the Reservation shortly after it was established by two Executive Orders issued by President Grant in 1872. Exec. Order No. 33-1 (Apr. 9, 1872) (establishing Reservation); Exec. Order No. 33-2 (July 2, 1872) (amending boundaries of Reservation); see *Seymour* v. *Superintendent*, 368 U.S. 351, 354 (1962) (discussing formation of Reservation); *Tonasket* v. *State*, 525 P.2d 744, 745-746 (Wash. 1974) (en banc) (same).

Section 2 of Public Law 280 [5] could be sustained only if the infraction violated the State's "criminal/prohibitory" laws rather than its "civil/regulatory" laws. Pet. App. B12-B14.[6] Because the court was of the view that the State's "traffic 'infraction' code is designed to promote the strong public policy of protecting the safety and health of its citizens on public highways," *id.* at B17, it held that the state statute in question is a criminal law for purposes of the assumption of jurisdiction authorized by Section 2 of Public Law 280.

6. The court of appeals reversed. Pet. App. A1-A8. In Part I of its opinion, the court of appeals explained that the State's own characterization of its law made clear that the State's "public policy is served by treating speeding as a civil/regulatory offense." *Id.* at A6. In the court's view, this character-

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[5] Because Washington was not one of the five States named in Section 2 of Public Law 280, and because Washington was one of the States named in Section 6, Washington technically could not assume criminal jurisdiction directly under Section 2, but instead could assume jurisdiction only by compliance with Sections 6 and 7. See *Yakima*, 439 U.S. at 474, 481. Section 6, however, permitted Washington to assume jurisdiction "in accordance with the provisions of this Act." 67 Stat. 590. Accordingly, the jurisdiction Washington could assume pursuant to Section 6 is substantively identical to the jurisdiction described in Sections 2 and 4 of Public Law 280. See *Yakima*, 439 U.S. at 495-496 (noting that the reference in Section 6 to the "provisions of [this] Act" suggests that other provisions of Public Law 280 clarify the substantive scope of the jurisdictional grant to Section 6 States).

[6] Petitioners have argued only that jurisdiction is proper under the grant of criminal jurisdiction in Section 2 of Public Law 280; they do not rely on the grant of civil jurisdiction in Section 4 of Public Law 280. See Pet. App. A5.

ization by the State is sufficient to preclude petitioners from claiming that the statute involved an exercise of criminal jurisdiction permitted by Section 2 of Public Law 280. Pet. App. A6-A7.

In Part II of its opinion, the court further explained (Pet. App. A7-A8) that the state statute should be considered as civil/regulatory under the public-policy analysis articulated in *Cabazon*, where the Court described the "shorthand test" to be whether the conduct in question "violates the State's public policy," 480 U.S. at 209; see *id.* at 209-212. The court of appeals expressed this view:

> *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a basic activity is prohibited.

Pet. App. A7. Applying that analysis, the court of appeals reasoned that "although *speeding* remains against the state's public policy, * * * speeding is but an extension of driving—the permitted activity—which occasionally is incident to the operation of a motor vehicle." *Id.* at A7-A8. Accordingly, the court concluded that even under the *Cabazon* analysis applicable to a statute that imposes criminal penalties, the state statute would be treated as civil/regulatory in nature, and thus would not be enforceable against Indians in Indian country under the grant of criminal jurisdiction set forth in Section 2 of Public Law 280.

DISCUSSION

The court of appeals correctly held that the state statutory provisions governing the traffic infractions at issue here—which are expressly deemed by state law not to be "criminal offense[s]" and are instead

treated by the State as civil infractions—are not "criminal" laws for purposes of the grant of criminal jurisdiction over Indians on an Indian reservation under Section 2 of Public law 280. That ruling does not conflict with any decision of this Court or of any of the courts of appeals. It also does not leave a gap in enforcement of traffic laws on the Colville Reservation, because the Tribes have adopted their own traffic code that governs the same conduct. For these reasons, the petition for a writ of certiorari should be denied.

1. The provisions of the Washington traffic code that govern "traffic infraction[s]" are not within the scope of the "criminal" jurisdiction that a State may assume pursuant to Section 2 of Public Law 280.[7] The applicable state law, on its face, establishes as much. Washington's 1979 amendments were intended to decriminalize certain traffic offenses, including speeding. To that end, Washington law designates the violations at issue as "traffic infraction[s]" and expressly provides that "a traffic infraction may not be classified as a criminal offense." Furthermore, the Washington Supreme Court has characterized a traffic infraction as "civil" in nature, noting that "the procedures for adjudicating infractions are distinct from those required in criminal cases. See *City of Kennewick* v. *Fountain*, 802 P.2d 1371, 1373-1374 (1991). Because the State of Washington has made a deliberate policy choice to treat the traffic violations at issue here as civil rather than criminal for its own purposes, there is no reason why the State should not be taken at its word for purposes of determining

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[7] Petitioners do not contend that the Washington laws governing traffic infractions fall within the grant in Section 4 of Public Law 280. See note 6, *supra*.

whether the laws governing traffic infractions fall within the criminal jurisdiction that a State may assume pursuant to Section 2 of Public Law 280.

To be sure, in *Cabazon* the Court held that the fact that California attached criminal penalties to a violation of a state gambling statute was not dispositive of the question whether the statute should be treated as "criminal" within the meaning of Section 2 of Public Law 280. The Court pointed out that in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), it had interpreted Section 4 of Public Law 280 to grant the States jurisdiction over "private civil litigation involving reservation Indians," but "not to grant general civil regulatory authority," including the authority to tax. 480 U.S. at 208 (citing 426 U.S. at 385, 388-390). This interpretation was required, the Court explained, because Public Law 280 was not intended to effect "total assimilation" of Indian tribes, and because a grant of regulatory jurisdiction over Indians on a reservation "would result in the destruction of tribal institutions and values." 480 U.S. at 208. The Court then concluded:

> [T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.

480 U.S. at 211.

Thus, the purpose of the inquiry in *Cabazon* was to determine whether a state statute that concededly *was* criminal nonetheless fell outside the general grant of criminal jurisdiction in Section 2 because the underlying statutory scheme to which the criminal

penalties were attached was regulatory (or civil) in nature. But *Cabazon* does not suggest that Section 2 allows a State to assume jurisdiction under a state statute that is not even ostensibly criminal in nature. That approach would substitute the underlying policies of Public Law 280 that the Court invoked in *Cabazon* as a means of *limiting* the reach of that statute into the equivalent of Public Law 280 itself, and thereby result in an expansion of state jurisdiction beyond that conferred even by the literal language of Section 2.[8] Accordingly, as the court of appeals held, when a State itself characterizes its own law as civil, the courts generally should accept that characterization at face value and hold that the statute is not within the criminal jurisdiction described in Section 2 of Public Law 280.

2. We are unpersuaded, however, by the analysis set forth by the court of appeals in Part II of its opinion. There, the court noted that the State generally permits driving on the highways and characterized speeding as a prohibited subset of this permitted activity. Accordingly, in attempting to apply *Cabazon*'s "public policy" analysis, the court indicated that the state statute would be treated as civil even if it did impose criminal penalties. Pet. App. A7-A8.

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[8] Cf. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990):

> It is one thing to suggest * * * that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine * * * into new and uncharted fields.

In our view, this represents an overly wooden and intrusive application of the *Cabazon* analysis. Such a rule effectively would prohibit any State from enforcing traffic laws under Public Law 280, so long as the State permits driving on the highways. Moreover, the logical implications of this analysis could lead to sharp restrictions on the types of criminal laws enforceable under Public Law 280. For example, it might be argued that a state statute prohibiting illegal use of pharmaceuticals is only a regulatory law, because such use is only "a small subset or facet of a larger, permitted activity," Pet. App. A7—namely, use of prescription drugs.

A more commonsense application of the *Cabazon* analysis would operate at a lower level of generality, treating the relevant conduct here as speeding. Like many other traffic violations, speeding is traditionally understood in our society as a prohibited activity. Accordingly, if the traffic laws at issue here provided for criminal penalties, they generally would fall within the grant of criminal jurisdiction described in Section 2 of Public Law 280. Compare *St. Germaine* v. *Circuit Court*, 938 F.2d 75, 76-77 (7th Cir. 1991) (concluding that a criminal provision of a traffic code is enforceable under Section 2 of Public Law 280). Such a scenario would differ substantially from the situation presented in *Cabazon*, where California attempted to prevent Indians from conducting bingo games, even though California (like many other States) routinely permitted charitable organizations to conduct bingo games. 480 U.S. at 211. In sum, contrary to the court of appeals' opinion, we do not believe the *Cabazon* inquiry into whether a law is prohibitory or regulatory in nature should, absent unusual circumstances, operate to deprive the State of the ability to punish as a criminal offense conduct

that traditionally is prohibited in the operation of a motor vehicle. That issue is not presented here, however, because, as the court of appeals correctly reasoned in Part I of its opinion, the State of Washington does not in any event seek to punish the conduct at issue as a criminal offense.

3. We do not believe that the decision of the court of appeals presents an issue meriting review by this Court. The decision does not conflict with that of any other court of appeals. Petitioner's contention (Pet. 10-11) that it conflicts with the decision of the Seventh Circuit in *St. Germaine* is incorrect; as noted above, *St. Germaine* involved an offense that the State of Wisconsin indisputably treated as criminal, for which the defendant received a term of imprisonment of 190 days. See 938 F.2d at 75-76. By contrast, the instant case turns on the State's own characterization of the conduct as noncriminal. *St. Germaine* therefore is inapposite.[9] In fact, we are not aware of any other reported decision considering whether an offense that a State treats as civil nevertheless should be regarded as falling within the grant of criminal jurisdiction described in Section 2 of Public Law 280.

Finally, the decision of the court of appeals does not leave a jurisdictional void preventing enforcement of traffic laws on the Tribes' Reservation. To the contrary, the Tribes have enacted a traffic code applicable to the Reservation and have entered into cross-deputization arrangements with municipal and county officers patrolling the Reservation, so that all officers enjoy the capacity to enforce all applicable

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[9] The *St. Germaine* court noted this distinction, explaining that another provision of the Wisconsin statute, "which does not carry a mandatory jail sentence and fine for first offenders, might to that extent be considered merely regulatory but that is not our case." 938 F.2d at 77.

laws; the Tribes also have offered such arrangements to the State, although the State has declined to accept them. See Pet. App. A8; Br. in Opp. 12-14. For this reason, and by virtue of the novelty of the legal issue, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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